Peri Sentosa Sdn Bhd (in members' voluntary liquidation) & Anor v General Soil Engineering Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-22-2077 OF 1998
ABDUL WAHAB PATAIL J
8 JULY 1999

Arbitration *— Agreement — Reference of dispute — Construction of arbitration clause — Matters subject to arbitration — Distinction between dispute in relation to works and dispute over the agreement — Whether issues of rescission, specific performance and liability to damages for breach subject to arbitration proceedings*

Arbitration *— Stay of proceedings — Application — Reference of dispute — Construction of arbitration clause — Matters subject to arbitration — Distinction between dispute in relation to works and dispute over the agreement — Whether issues of rescission, specific performance and liability to damages for breach subject to arbitration proceedings — Whether stay ought to be granted*

The defendant had been awarded contractual works for the first plaintiff sometime in 1995. All interest of the first plaintiff was then transferred by the first plaintiff to the second plaintiff by 1 November 1997. On 15 December 1997, an agreement was entered into between the first plaintiff and the defendant as employer and contractor in respect of certain construction works. The agreement, inter alia, contained an arbitration clause — cl 34(1) — which provided for disputes arising out of the construction works to be referred to arbitration. Subsequently, owing to disputes, the defendant issued notice to the first plaintiff to concur on the appointment of an arbitrator and the matter was referred to arbitration. However, the plaintiffs thereafter filed a writ of summons and sought for inter alia: (a) a declaration that all the rights and interest of the first plaintiff in the contract be given and transferred to the second plaintiff; (b) a declaration that the contract be continued in the name of the second plaintiff; (c) specific performance of the contract; (d) further or in the alternative damages for breach of contract. The defendant in response applied to strike out the plaintiffs' claim under O 18 r 19 Rules of the High Court 1980 and alternatively sought a stay of the action under s 6 of the Arbitration Act 1952. The senior assistant registrar ('the SAR') allowed the defendant's application and struck out the plaintiffs' writ with costs to the defendant. The plaintiffs appealed.

Held, allowing the appeal and setting aside the SAR's order:

(1) Section 6 of the Arbitration Act 1952 gives a discretion to stay or refuse a stay of proceedings pending arbitration and the onus is upon the party objecting to the reference to arbitration to show why the matter should not be referred to arbitration. An arbitrator derives his authority from the agreement between the parties and his powers and duties are only those that the parties have agreed

to place upon him. The mere fact that an agreement contains an arbitration clause does not ipso facto disentitle a party from taking a matter to court (see pp 566H–I, 567A).

(2) From a construction of the arbitration clause — cl 34(1), it was clear that what had to be referred to arbitration were matters arising out of the works and not the contract. Clause 34(1) clearly made a distinction between a dispute under the agreement in relation to the works and a dispute over the agreement. Matters which arose out of the works were matters that could properly be referred to the arbitrator under cl 34(1) whereas the dispute over the parties to the agreement and the legal questions as to rescission were matters not subject to the arbitration proceedings (see p 567B–F).

(3) On the facts, the prayers as to specific performance and liability to damages for breach of contract were legal questions as to the agreement and not questions arising out of the works under the agreement. Since the matters though having some relationship, were essentially separate issues, there was no reason for the proceedings in the High Court to be stayed until the arbitration proceedings were completed (see p 568A–B).

(4) There was also no justification for a stay in respect of the prayer for the two declarations, which was a matter between the first and second plaintiffs (see p 567H).

[Bahasa Malaysia summary

Defendan telah memberikan kerja-kerja kontrak kepada plaintif pertama pada tahun 1995. Segala kepentingan plaintif pertama kemudiannya dipindah oleh plaintif pertama kepada plaintif kedua pada 1 November 1997. Pada 15 Disember 1997, suatu perjanjian telah diikat di antara plaintif pertama dan defendan sebagai majikan dan kontraktor berkenaan kerja-kerja pembinaan tertentu. Perjanjian tersebut, antara lain, mengandungi suatu fasal timbang tara — fasal 34(1) — yang memperuntukkan bahawa pertikaian yang berbangkit daripada kerja-kerja pembinaan hendaklah dirujuk kepada timbang tara. Berikutnya, akibat pertikaian, defendan telah mengeluarkan notis kepada plaintif pertama supaya bersetuju dengan perlantikan penimbangtara dan perkara tersebut telah dirujuk kepada timbang tara. Namun demikian, selepas itu plaintif-plaintif telah memfailkan satu writ saman dan memohon antara lain: (a) suatu perisytiharan bahawa segala hak dan kepentingan plaintif pertama dalam kontrak pertama diberikan dan dipindahkan kepada plaintif kedua; (b) suatu perisytiharan bahawa kontrak tersebut diteruskan di bawah nama plaintif kedua; (c) pelaksanaan spesifik kontrak tersebut; (d) selanjutnya atau secara alternatif ganti rugi untuk kemungkiran kontrak. Sebagai balasan defendan memohon untuk membatalkan tuntutan plaintif-plaintif di bawah A 18 k 19 Kaedah-Kaedah

A Mahkamah Tinggi 1980 dan secara alternatif memohon penggantungan tindakan di bawah s 6 Akta Timbang Tara 1952. Penolong kanan pendaftar ('PKP') membenarkan permohonan defendan dan membatalkan writ plaintif-plaintif dengan kos kepada defendan. Plaintif-plaintif merayu.

B

Diputuskan, membenarkan rayuan dan mengetepikan perintah PKP:

(1) Seksyen 6 Akta Timbang Tara 1952 memberikan budi bicara untuk menggantung atau menolak penggantungan prosiding
C sementara menunggu penyelesaian timbang tara dan beban terletak pada pihak yang membantah terhadap rujukan kepada timbang tara untuk menunjuk mengapa perkara tersebut tidak harus dirujuk kepada timbang tara. Seorang penimbangtara memperolehi kuasanya daripada perjanjian di antara pihak-pihak
D dan kuasa serta tugasnya hanyalah setakat itu yang pihak-pihak bersetuju memberikannya. Hakikat semata-mata bahawa suatu perjanjian mengandungi fasal timbang tara tidak secara ipso facto menyebabkan sesuatu pihak tidak berhak mengambil tindakan mahkamah (lihat ms 566H–I, 567A).

E (2) Daripada satu tafsiran fasal timbang tara — fasal 34(1) — adalah jelas bahawa apa yang perlu dirujuk kepada timbang tara adalah perkara yang berbangkit daripada kerja-kerja itu dan bukan kontrak tersebut. Fasal 34(1) jelas membuat perbezaan di antara satu pertikaian di bawah perjanjian berhubung dengan kerja-kerja itu dan satu pertikaian mengenai perjanjian tersebut. Perkara
F yang timbul daripada kerja-kerja itu adalah perkara yang boleh dirujuk dengan sewajarnya kepada timbangh tara di bawah fasal 34(1) manakala pertikaian tentang pihak kepada perjanjian tersebut dan persoalan undang-undang berkaitan pembatalan adalah perkara yang tidak tertakluk kepada prosiding timbang tara (lihat ms 567B–F).

G (3) Berdasarkan fakta-fakta, permohonan mengenai pelaksanaan spesifik dan liabiliti ke atas ganti rugi untuk kemungkiran kontrak adalah persoalan undang-undang yang berkaitan perjanjian tersebut dan bukan persoalan yang berbangkit daripada kerja-
H kerja di bawah perjanjian tersebut. Memandangkan perkara-perkara tersebut, meskipun adalah berkaitan, merupakan isu-isu berasingan pada dasarnya, tiada alasan untuk menggantung prosiding di Mahkamah Tinggi sehingga prosiding timbang tara selesai (lihat ms 568A–B).

(4) Tiada justifikasi untuk penggantungan berkaitan dengan
I permohonan untuk dua perisytiharan itu, yang merupakan satu perkara di antara plaintif pertama dan plaintif kedua (lihat ms 567H).]

Notes

For cases on arbitration agreement generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 862–891.

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1016–1034.

Cases referred to

Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208 (refd)

Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (refd)

Taunton Collins v Cromie & Anor [1964] 2 All ER 332 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Contracts Act 1950 s 19(1)

K Jeyaraj (*Rajindar Singh Veriah & Co*) for the plaintiffs.

Julie Teh (*Dorairaj, Low & Teh*) for the defendant.

Abdul Wahab Patail J: This appeal by the plaintiffs is against the decision of the learned senior assistant registrar ('SAR') on 12 March 1999 ordering that the plaintiffs' writ of summons dated 24 June 1998 in this action be struck out, judgment against the defendant set aside and costs to the defendant.

The background

The defendant was awarded contractual works for the first plaintiff in mid-1995. Works commenced on 16 October 1995. On 15 December 1997, an agreement was entered into between the first plaintiff and the defendant as employer and contractor, respectively, in respect of piling system and works, perimeter restraint walls system and basement construction.

According to the first and the second plaintiffs, a concurrent series of events occurred as follows. On 10 October 1996, the land upon which the works were being performed was transferred by the first plaintiff to the second plaintiff. All interest was transferred effectively by 12 November 1996. These actions were not relayed to the defendant. On or about 17 January 1997, a shareholders' resolution was passed to wind up the first plaintiff. In the meantime, the defendant continued works. On or about 15 December 1997, the defendant was asked to explain why the first plaintiff was still stated as employer when all interest had been transferred to the second plaintiff by 12 November 1996.

About four months later, on 18 March 1998 the defendant issued a letter alleging that the first plaintiff acted under fraud and misrepresentation in inducing the defendant to sign a contract with the first plaintiff on 15 December 1997 after having passed a resolution to wind up the company on 17 January 1997, and gave notice to determine its employment

A as contractor under cl 26(1)(d) of 15 December 1997 agreement as well as to rescind the contract under s 19(1) of the Contracts Act 1950. The allegations were denied.

What appears to have prompted the defendant's letter of 18 March 1998 appears to be the fact that Certificate Nos 18 and 19 for the sum of
B RM476,449.50 and RM138,869.99 and due on 14 January and 23 February 1998 were not paid. On 17 February 1998 a notice to determine its employment because of the first plaintiff's failure to pay on Certificate No 18 was issued. On 10 April 1998, the defendant issued notice to the first plaintiff to concur on appointment of an arbitrator:

> C A dispute or difference has now arisen since you have refused to settle the claims as submitted vide our letter L98/GSE/671/218 dated 31 March 1998.
>
> Accordingly, pursuant to cl 34(1) of the conditions of contract we hereby appoint ... for your concurrence to be the arbitrator to settle the said dispute or difference.

D To cut matters short, an arbitrator recommended by the Persatuan Akitek Malaysia was eventually agreed upon and a first meeting was held on 30 July 1998.

No copy of the letter of 31 March 1998 which would be the basis of the matter before the arbitrator was put before the court. Some indication is provided in the defendant's letter to the president of Persatuan Akitek
E Malaysia dated 24 April 1998:

> Briefly, a dispute or difference has arisen after the contractor had on 17 February 1998 determined the employment under cl 26(1)(a) of the conditions and after the employer has refused to settle the claims from the contractor in accordance with cl 26(2), while there are also disputes or
> F differences on the issues on extension of time, certificate of non-completion and extra claims to be settled by arbitration.

It is common ground in submissions that there are details of payments due for works performed to be settled, and the first and the second plaintiffs did not dispute there is a role for the arbitrator.

G *The writ of summons*

On 29 June 1998, the plaintiffs filed a writ of summons in this action for the following:

> Di dalam keadaan sebegini, pihak plaintif pertama dan kedua menuntut
> H kepada mahkamah yang mulia ini:
>
> (a) satu deklarasi bahawa kesemua hak, hakmilik dan kepentingan pihak plaintif pertama di dalam kontrak tersebut diberi dan dipegang oleh pihak plaintif kedua; dan
>
> (b) satu deklarasi bahawa kontrak tersebut diteruskan di bawah nama pihak plaintif kedua;
>
> I
>
> DAN pihak plaintif kedua menuntut:
>
> (a) satu perintah 'specific performance' kontrak tersebut;

(b) selanjutnya atau secara alternatif, ganti rugi di atas kemungkiran kontrak; A

(c) faedah di atas ganti rugi tersebut;

(d) lain-lain relief; dan

(e) kos.

The summons in chambers B

The defendant's response to the writ is an application for the following:

1 Segala prosiding selanjutnya di dalam tindakan di sini digantungkan sehingga pendengaran permohonan ini.

2 Writ saman bertarikh 24 Jun 1998 di dalam tindakan di sini hendaklah dibatalkan dan guaman plaintif-plaintif terhadap defendan diketepikan dan dibuang di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau di bawah bidang kuasa sedia ada mahkamah yang mulia ini; bahawa: C

(a) ia mengaibkan, remeh atau menyusahkan; dan/atau

(b) ia boleh menjejaskan, menghalang atau melengahkan perbicaraan tindakan ini dengan adil; dan/atau D

(c) ia selainnya adalah suatu penyalahan proses mahkamah; atau secara alternatif;

3 Segala prosiding selanjutnya di dalam tindakan di sini digantungkan di bawah s 6 Akta Timbangtara 1952 atas alasan plaintif pertama dan defendan telah melalui perjanjian bertulis bertarikh 15 Disember 1997 bersetuju untuk merujuk kepada timbangtara perkara-perkara yang menjadi subjek tindakan di sini; E

4 kos permohonan ini, segala kos bersampingan dan kos tindakan di sini dibayar oleh plaintif-plaintif kepada defendan; dan

5 relief-relief lain atau lanjut yang dianggap adil atau suaimanfaat oleh mahkamah yang mulia ini. F

The reasons for the application are stated by the defendant to be as follows:

(i) Pertikaian di antara plaintif-plaintif dan defendan berbangkit daripada suatu perjanjian bertulis yang mengandungi 'klausa timbangtara'. G

(ii) Pertikaian di antara plaintif-plaintif dan defendan telah dengan persetujuan dirujuk kepada penimbangtara lanjutan daripada klausa timbangtara tersebut.

(iii) Tindakan di sini dimulakan selepas rujukan ke penimbangtara dan merupakan suatu penyalahgunaan proses mahkamah yang mulia ini. H

The considerations

In *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20, it was held that s 6 of the Arbitration Act 1952 gives a discretion to stay or refuse a stay of proceeding pending arbitration, and the onus is therefore upon the party objecting to the reference to arbitration to show why the matter should not be referred to arbitration. This view is supported by the decision in *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 although it was I

A not referred to in *Hashim bin Majid v Param Cumaraswamy & Ors*. It was also held that an arbitrator derives his authority from the agreement between the parties and that consequently, his powers and duties are those and only those that the parties have agreed to place upon him. Thus the mere fact that an agreement contains an arbitration clause does not ipso facto disentitle a party from taking a matter to court. Because a party must B be held to what he has agreed to in an agreement, it is essential to consider specifically what it is he has agreed to. The arbitration clause agreed to by the parties and written into the agreement provides:

> 34(1) In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the C progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising thereunder, or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement or valuation mentioned in cl 30(5)(a) of these conditions D or the rights and liabilities of the parties under cll 25, 26, 31 or 32 of these conditions, then such disputes or differences shall be referred to arbitration.

It is clear from the above the matters that must be referred to arbitration are those matters arising out of the works, not the contract. If the dispute relates to terminating or rescinding of the contract, then whether a party is entitled E to do so is clearly a matter of law. So also if fraud or misrepresentation is alleged as the basis of terminating or rescinding the contract. Following the approach in these cases, and considering the terms of the letter to the president of Persatuan Akitek Malaysia dated 24 April 1998 as quoted earlier above read with cl 34(1) of the agreement, clearly matters arising out F of the works are matters that can properly be referred to the arbitrator under cl 34(1), whereas a dispute over the parties to the agreement and purely legal questions as to rescission or termination are matters that are not clearly agreed to be subject to arbitration proceedings. Given the wording of cl 34(1), there is a clear distinction between a dispute under the agreement in relation to the works and a dispute over the agreement. Thus as in *Taunton* G *Collins v Cromie & Anor* [1964] 2 All ER 332, whilst it was held to be undesirable to have two proceedings before two different tribunals, a stay was granted. The action was not dismissed as such.

The learned SAR had clearly erred in granting the orders in the terms prayed for, that the writ be set aside. At most an order of stay may be H considered as per the alternative prayer in prayer two of the defendant's summons in chambers. In such event, there is no justification for a stay in respect of the first prayer for the two declarations which is a matter between the first and the second plaintiffs, essentially to set the record straight and to answer the very question that sparked off the usual problems between employer and contractor into a full conflagration replete with allegations of I misrepresentation and fraud.

Regrettably in the submissions before me, counsel for the defendant confined herself to submission of abuse of process and undesirability of a

matter being in two forums, and submitted that the writ ought to be struck out. Notwithstanding not having the benefit of submissions by the defendant's counsel as to the alternative prayer three in the summons in chambers, I have taken into consideration that the prayers as to specific performance and liability to damages for breach of contract are legal questions as to the agreement and not solely a question arising out of the works under the agreement, and since the matters, though having some relationship, are essentially separate issues, there is no reason for a stay of the proceeding in the High Court until the arbitration hearing is completed. Indeed there may be better reason for the legal questions to be dealt with by the court first before the details of payments due and other assessment be made by the arbitrator under cl 34(1).

For these reasons, I have allowed the appeal and set aside the order of the learned SAR.

Appeal allowed.

Reported by Andrew Christopher Simon